STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID C. HILL,

Defendant-Appellant.

UNPUBLISHED
September 23, 2003

No. 240022
Wayne Circuit Court
LC No. 00-003607-01

Before: Whitbeck, C.J., and Gage and Zahra, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of second-degree murder, MCL 750.317. The trial court sentenced defendant to 35 to 60 years' imprisonment. We affirm.

On charges stemming from the instant case, defendant was jointly tried with a codefendant, albeit before a different jury. A third codefendant pleaded guilty to charges stemming from the incident. Allegedly because of a dispute over money, defendant and the two codefendants sought out the victim. After finding the victim, defendant and the two codefendants proceeded to beat him. During the attack, one of the codefendants shot the victim. The victim later died. At trial, the prosecution theorized that defendant aided and abetted in the murder of the victim. It is undisputed that defendant did not shoot the victim.

Sometime after the incident, defendant was arrested, with a firearm in his possession, and questioned regarding the circumstances of the incident. The record establishes that defendant received injuries during the arrest, was treated at a hospital for two lacerations to the head, and was then returned to police custody. Defendant thereafter made a statement to the police regarding the incident.

Defendant first contends that the trial court clearly erred in determining that his statement to the police was voluntarily made. Defendant primarily argues that, because of the head injury sustained during his arrest, he did not understand what was happening when he waived his rights and agreed to be interviewed by the officer. Defendant also argues that he asked for an attorney, but the interviewing officer ignored his request. This Court reviews de novo the entire record of the proceedings regarding a motion to suppress, but, giving deference to the trial court's ability to assess the credibility of witnesses, will not disturb a trial court's factual findings unless they are clearly erroneous. *People v Cheatham*, 453 Mich 1, 29-30; 551 NW2d 355 (1996).

The test for determining whether a statement was voluntarily made is whether, "considering the totality of the surrounding circumstances, the confession is 'the product of an essentially free and unconstrained choice by its maker,' or whether the accused's 'will has been overborne and his capacity for self-determination critically impaired.'" *People v Wells*, 238 Mich App 383, 386; 605 NW2d 374 (1999), quoting *People v Cipriano*, 431 Mich 315, 333-334; 429 NW2d 781 (1988), quoting *Culombe v Connecticut*, 367 US 568, 602; 81 S Ct 1860; 6 L Ed 2d 1037 (1961). Thus, the ultimate test for determining whether a statement was voluntarily made depends on the totality of the circumstances surrounding the statement. *Wells*, *supra* at 387.

The various factors to be considered in determining voluntariness were set forth in *Cipriano*, *supra*. These factors include: the age of the accused; his lack of education or his intelligence level; the extent of his previous experience with the police; the repeated and prolonged nature of the questioning; the length of the detention of the accused before he gave the statement; the lack of any advice to the accused of his constitutional rights; whether there was unnecessary delay in bringing the accused before a magistrate before he gave the confession; whether the accused was injured, intoxicated or drugged, or in ill health when he gave the statement; whether the accused was deprived of food, sleep, or medical attention; whether he was physically abused; and whether he was threatened with abuse. *Id*. at 334.

The record indicates that defendant initialed each of his constitutional rights on a standard waiver of rights form and signed the form twice. This supports the police officer's testimony – and the trial court's finding – that defendant was informed of, and waived, his right to an attorney and his right to remain silent. The record further indicates, as the trial court noted, that defendant had prior experience with the police and had previously given statements to the police after waiving his rights. "[A] defendant's previous experience with the police is 'an important consideration in determining whether an inculpatory statement was made voluntarily and understandingly.'" *Cheatham*, *supra* at 34-35, quoting *State v Fincher*, 309 NC 1, 20; 305 SE2d 685 (1983).

The trial court considered the relevant circumstances and decided that defendant voluntarily agreed to answer questions. The trial court was made aware at the suppression hearing that, after his arrest, defendant was treated at a hospital for two lacerations to his head and was released into police custody. The trial court, however, determined that defendant would still have been able to understand and respond appropriately to police questioning, and there is nothing in the medical records that refutes this conclusion. Given the conflicting testimony at the evidentiary hearing regarding whether defendant's head injuries affected his ability to think clearly and respond to the police, we defer to the trial court's determination of the credibility of the witnesses. *People v Daoust*, 228 Mich App 1, 17; 577 NW2d 179 (1998). Because the trial court's finding of voluntariness was supported by the evidence, we conclude that the trial court did not clearly err in determining that defendant voluntarily waived his constitutional rights – including his right to counsel – and agreed to answer police questions.

Defendant next contends that the trial court abused its discretion by allowing the prosecutor to introduce evidence regarding the firearm that was recovered at the time defendant was arrested. Defendant argues that his alleged possession of a weapon at a time and place far removed from the murder was not relevant and that the prosecutor failed to timely provide defendant with a copy of the laboratory report[1] regarding the firearm that was recovered. This Court reviews a trial court's decision to admit evidence for an abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998).

We note that the laboratory report was not exculpatory because the ballistics testing indicated that the firearm was the murder weapon. However, assuming, as the prosecutor appears to concede, that defendant did not receive a copy of the laboratory report concerning the firearm until the beginning of trial, defendant has arguably established a violation of the district court's discovery order. "When determining the appropriate remedy for discovery violations, the trial court must balance the interests of the courts, the public, and the parties in light of all the relevant circumstances, including the reasons for non-compliance." *People v Banks*, 249 Mich App 247, 252; 642 NW2d 351 (2002), citing *People v Davie, (After Remand)*, 225 Mich App 592, 598; 571 NW2d 229 (1997).

The trial court determined that defendant did not timely obtain the laboratory report because, unbeknownst to the prosecutor, defense counsel failed to pick up the report from the police department. Moreover, defendant was well aware of the existence of the firearm but failed to move before trial to suppress the weapon, to preclude reference to it, or to be permitted to independently test it pursuant to MCR 6.201(A)(6). The trial court properly evaluated all the relevant facts and circumstances and exercised its discretion in precluding reference to the firearm in the opening statements, while still permitting it to be introduced during the prosecutor's case-in-chief. The firearm was not exculpatory evidence, and because defendant has failed to demonstrate that any favorable evidence would have resulted from independent testing of the recovered firearm, we conclude that defendant has failed to demonstrate an abuse of the trial court's discretion.

Defendant next contends that the untimely provision of the laboratory report concerning the recovered firearm deprived him of due process of law. Const 1963, art 1, § 17. Defendant argues that the prosecutor "sandbagged" him by failing to turn the report over in a timely manner. Whether the prosecutor committed misconduct is a mixed question of law and fact. *People v Tracey*, 221 Mich App 321, 323; 561 NW2d 133 (1997). This Court reviews factual findings for clear error and questions of law de novo. *Id*. at 323-324.

[1] Defendant continually refers to the toxicology report and contends that this report contained a reference to the gun that was recovered at the time of defendant's arrest. However, the record indicates that there was a toxicology report produced concerning the victim's drug screen *and* there was a laboratory report produced concerning the ballistic testing of the recovered weapon. Defendant's counsel admitted he received the toxicology report after he requested it, but claimed he did not have the ballistics report. Defendant's reference to the toxicology report is therefore mistaken and misleading because he does not raise any issue concerning the toxicology report.

"[T]he touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor." *Smith v Phillips*, 455 US 209, 219; 102 S Ct 940; 71 L Ed 2d 78 (1982). In this case, defendant failed to take any steps to show that the report's conclusion was erroneous. Further, the prosecutor claimed the firearm was used by the codefendant – not defendant. Finally, defendant failed to otherwise show any unfair prejudice stemming from the introduction of the report. *People v Robinson*, 386 Mich 551, 562; 194 NW2d 709 (1972); *People v Mateo*, 453 Mich 203, 215; 551 NW2d 891 (1996). Therefore, we find defendant has failed to demonstrate that the late provision of the firearm ballistics report deprived him of due process.

Defendant next contends that his counsel failed to provide effective assistance of counsel because he did not move to suppress evidence on the alternate ground that defendant's arrest was invalid because the police lacked probable cause. A claim of ineffective assistance of counsel presents a mixed question of law and fact. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Again, this Court reviews the trial court's findings of fact for clear error and its determinations of law de novo. *Id.* To show ineffective assistance of counsel, defendant must demonstrate that his "counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced [him]" that it deprived him of a fair trial. *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994). Because defendant failed to move for a new trial or evidentiary hearing below, this Court's review is limited to the existing record. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658; 620 NW2d 19 (2000).

A review of the record shows that the police had probable cause to arrest defendant for violation of Detroit City Code § 38-10-58, which forbids the open carrying of loaded firearms in public places. The police also had reasonable suspicion to justify a brief detention of defendant for questioning after observing him with a gun. *Terry v Ohio*, 392 US 1, 16; 88 S Ct 1868; 20 L Ed 2d 889 (1968); *United States v Cortez*, 449 US 411, 417-418; 101 S Ct 690; 66 L Ed 2d 621 (1981). Additionally, defendant's "unprovoked flight upon noticing the police" was "a pertinent factor in determining reasonable suspicion." *Illinois v Wardlow*, 528 US 119, 124; 120 S Ct 673; 145 L Ed 2d (2000). Under the circumstances, on this record, we find that a motion to suppress would not have been successful. Defense counsel is not required to make futile or meritless motions. *Sabin, supra* at 660. Thus, defendant has failed to show he was denied the effective assistance of counsel.

Defendant finally contends that this Court should conclude that Const 1963, art 1, § 17 requires the police to adopt a policy of electronically recording all in-custody interrogations or confessions. We rejected this claim in *People v Fike*, 228 Mich App 178, 183-186; 577 NW2d 903 (1998), and defendant's attempt to distinguish *Fike* is unconvincing.

Affirmed.

/s/ William C. Whitbeck
/s/ Hilda R. Gage
/s/ Brian K. Zahra